

Transcending the *Youngstown* Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine

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The time is ripe for a reappraisal of the separation of powers as the organizing principle of our federal government. Most of the relevant doctrinal architecture has been constructed over the past seven decades. Perhaps because of Justice Robert H. Jackson’s incomparable brilliance as a writer, the two-dimensional landscape famously described in his concurring opinion condemning President Truman’s seizure of the U.S. steel industry has dominated discourse about the interaction of the three federal branches. Charting presidential conduct on the vertical axis of a map whose horizontal axis measures Congress’s position ranging from approval to disapproval gave Jackson an elegantly simple and memorable way to classify presidential actions from the most strongly defensible to the most constitutionally vulnerable.

The resulting classification scheme became a convenient triptych describing the geography of a “flatland” constitutional universe—one constructed in a two-dimensional space, carved into three simple zones. Missing from that triptych has been an analytical guide for navigating what is in truth the multidimensional universe of relevant constitutional values and relationships. This Essay sets out a proposed approach to developing such a guide.

In 2008, the Obama campaign joined critics on the left in accusing the Bush Administration of executive overreach, and then-Senator Obama promised a return to separation of powers first principles.¹ But as President Obama’s

1. See, e.g., LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 186-87* (2014); Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 523-24 (2008); Solomon Kleinsmith, *Opinion: Why Obama’s a Hypocrite*

second term draws to a close, the political valence of the Bush-era debates on executive power has inverted. Facing inflexible Republican opposition on issues like immigration reform,² firearms regulation,³ and Guantanamo,⁴ President Obama has often adopted “muscular views of his statutory and inherent authority,” while seeking to distinguish “overt Bush-style claims to unilateral constitutional power.”⁵

Unsurprisingly, President Obama has drawn criticism for his actions in both the foreign and domestic realms—from his lethal drone strikes against U.S. citizens abroad to his decision to “delay[] for substantial periods the enforcement of key provisions of the Affordable Care Act.”⁶ Most of the President’s controversial executive actions have in fact been readily defensible as falling within his constitutional and statutory authority. Take, for example, his much-criticized decision to expand background checks on gun purchasers, which involved nothing more than reading the Brady Act as it was written, without the gun-show loophole informally grafted onto the bill by pro-gun activists.⁷ In some policy areas, the President is, if anything, *underutilizing* his statutory authority. A number of scholars have recently argued, for instance, that Obama’s IRS could close the carried-interest loophole—the perennial target of liberal tax reformers—simply by promulgating a regulation well within its statutory mandate.⁸

on Executive Power, WNYC (Jan. 5, 2012), <http://www.wnyc.org/story/179466-opinion-why-obamas-hypocrite-signing-statements> [<http://perma.cc/NU58-HCKL>].

2. See, e.g., Opinion, *Obama Moving on Immigration at Last – Without Recalcitrant Congress*, L.A. DAILY NEWS (Nov. 13, 2014, 3:55 PM), <http://www.dailynews.com/opinion/20141113/obama-moving-on-immigration-at-last-x2014-without-recalcitrant-congress-opinion> [<http://perma.cc/DQ6X-3WKF>].
3. Laurence H. Tribe, *Obama’s Gun Actions Are Absolutely Legal, Profoundly Right*, CNN (Jan. 5, 2016, 7:59 PM), <http://www.cnn.com/2016/01/05/opinions/tribe-obama-action-on-guns> [<http://perma.cc/LP9L-5RWJ>].
4. See Maya Rhodan, *President Obama Will Close Guantanamo Bay Prison: Aide*, TIME (Jan. 11, 2016), <http://time.com/4174931/president-obama-will-close-guantanamo-bay-prison-aide> [<http://perma.cc/BTM7-FS97>].
5. TRIBE & MATZ, *supra* note 1, at 187.
6. Ron Paul, *An Unconstitutional Killing: Obama’s Killing of Awlaki Violates American Principles*, DAILY NEWS (Oct. 2, 2011, 4:00 AM), <http://www.nydailynews.com/opinion/unconstitutional-killing-obama-killing-awlaki-violates-american-principles-article-1.961079> [<http://perma.cc/JTR5-JEV2>]; Simon Lazarus, *Delaying Parts of Obamacare: ‘Blatantly Illegal’ or Routine Adjustment?*, THE ATLANTIC (July 17, 2013), <http://www.theatlantic.com/national/archive/2013/07/delaying-parts-of-obamacare-blatantly-illegal-or-routine-adjustment/277873/> [<http://perma.cc/4WUG-XSU2>].
7. See Tribe, *supra* note 3.
8. Gretchen Morgenson, *Ending Tax Break for Ultrawealthy May Not Take an Act of Congress*, N.Y. TIMES (May 6, 2016), <http://www.nytimes.com/2016/05/08/business/ending-tax-break-for-ultrawealthy-may-not-take-act-of-congress.html> [<http://perma.cc/C4GU-EQMZ>]. For an analysis of why presidents frequently underutilize the authority to modify

But this President, like his predecessors, has at times pushed against the boundaries of his authority. He has, for example, adopted a robust conception of the Executive's power and responsibility to interpret for itself the constitutionality of Congress's laws (an arena where the Judiciary's authority is often considered supreme if not exclusive), most notably in his controversial decision to decline to defend the Defense of Marriage Act (DOMA) in federal court.⁹ The bombing campaigns against targets like ISIL in Libya and Syria have stirred vigorous debate over the scope of presidential war powers.¹⁰ And, although both Republican and Democratic presidents have long used prosecutorial discretion to advance their favored policy objectives, President Obama's decisions to systematically under-enforce certain immigration laws and to "abstain[] from investigating and prosecuting certain federal marijuana offenses in states where possession is legalized"¹¹ have drawn sustained legal challenges¹² and accusations of executive abuse.¹³

tax regulations, see Daniel Hemel, *The President's Power To Tax*, 102 CORNELL L. REV. (forthcoming 2016).

9. Compare Dawn Johnsen, *The Obama Administration's Decision To Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 603 (2012) (approving of President Obama's decision not to defend DOMA because to do so would have "contributed to the continued exclusion from full and equal standing under the law" to a historically marginalized population), and TRIBE & MATZ, *supra* note 1, at 187 (identifying the President's decision not to defend DOMA as a notable example of executive action criticized as overreach by conservatives), with Charles Fried, *The Solicitor General's Office, Tradition, and Conviction*, 81 FORDHAM L. REV. 549, 549 (2012) (characterizing the Obama Administration's decision not to defend DOMA as "anomalous" and "unjustified").
10. See Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> [<http://perma.cc/7LK3-Z2SS>] (arguing that Obama's Libya campaign violates the War Powers Act); Bruce Ackerman, *The War Against ISIS Is Unconstitutional*, LAWFARE (May 5, 2016), <http://www.lawfareblog.com/war-against-isis-unconstitutional> [<http://perma.cc/UX5U-S727>] (arguing that Obama's undeclared war against ISIS is unlawful).
11. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014).
12. See *United States v. Texas*, No. 15-674 (June 23, 2016) (per curiam); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015); *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); see also Warren Richey, *Supreme Court Prods Obama Administration in Colorado Marijuana Dispute (+Video)*, CHRISTIAN SCIENCE MONITOR (May 4, 2015), <http://www.csmonitor.com/USA/Justice/2015/0504/Supreme-Court-prods-Obama-administration-in-Colorado-marijuana-dispute-video> [<http://perma.cc/EVC7-EMAH>] (discussing Oklahoma and Nebraska's legal challenge which argued that Colorado's "2012 ballot initiative decriminalizing marijuana is preempted by federal drug laws and is, thus, unconstitutional" despite the fact that "the Justice Department has looked the other way while states like Colorado, Oregon, Washington, and Alaska have sought to decriminalize recreational use of marijuana").
13. TRIBE & MATZ, *supra* note 1, at 187; Price, *supra* note 11 at 674; see also Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1136 (2015) (noting the aggressive use of "policy-driven nonenforcement" by Presidents Reagan and George W. Bush and arguing that Obama has "continued the trend").

Although disputes over presidential authority are typically resolved in the political arena, the Court does occasionally intervene, and the Roberts Court has shown greater willingness to step in than its predecessors by taking a more limited view of the political question doctrine.¹⁴ During Obama's tenure, the Court has decided several unusually significant separation-of-powers cases, including *NLRB v. Noel Canning*,¹⁵ *Zivotofsky I*,¹⁶ and, most recently, *Zivotofsky v. Kerry (Zivotofsky II)*,¹⁷ all of which rejected arguments that the issues were nonjusticiable.¹⁸

If the polls are to be believed, we may well face another four years of divided government, which means the Court will get no break from high-profile separation-of-powers disputes once a new President and a ninth Justice are finally installed.¹⁹ The reconstituted Court will likely continue to take an active role, rather than a role of pragmatic abstention and avoidance, in resolving disputes between the political branches—a role more consistent with the Court's general duty to interpret the Constitution and laws of the United States when the lives or liberties of individuals depend on their meaning.

Since *Marbury v. Madison*, the Supreme Court has emphatically insisted on the judicial duty to “say what the law is.”²⁰ This baseline conception has at times been invoked not only to assert the federal judiciary's obligation and authority to invalidate legislative and executive actions deemed inconsistent with the Constitution, but also—and I think unjustifiably—to preclude

14. See *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 132 S. Ct. 1421, 1427 (2012) (“In general, the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.” (quotations omitted)); *TRIBE & MATZ, supra* note 1, at 187 (“[Q]uestions about the separation of powers only rarely reach the Court. When they do, the Court treads carefully.”).

15. 134 S. Ct. 2550 (2014) (recess appointments).

16. 132 S. Ct. 1421.

17. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (*Zivotofsky II*).

18. See *Zivotofsky II*, 134 S. Ct. at 2096 (ruling on the merits of the case and not dismissing the case as non-justiciable); *Noel Canning*, 134 S. Ct. at 2578; *Zivotofsky I*, 132 S. Ct. at 1430 (“The political question doctrine poses no bar to judicial review of this case.”); Victor Williams, *NLRB v. Noel Canning Presents a Nonjusticiable Political Question*, 2014 *CARDOZO L. REV. DE NOVO* 45 (providing arguments that *Noel Canning* presented a nonjusticiable political question which the Court necessarily rejected when it ruled on the merits).

19. On March 16, 2016, President Obama nominated D.C. Circuit Chief Judge Merrick Garland to fill the vacancy left by Justice Antonin Scalia's untimely death on February 13, 2016, barely into the President's final year in office. For a reflection on Justice Scalia's contributions and critique of his jurisprudence, see Laurence H. Tribe, *The Scalia Myth*, *N.Y. REV. BOOKS* (Feb. 27, 2016, 11:01 AM), <http://www.nybooks.com/daily/2016/02/27/the-scalia-myth> [<http://perma.cc/6CT8-7SVZ>]. As of this writing, the Republican leadership of the Senate is sticking by the unprecedented position that a vacancy arising in a sitting President's last year in that office should not be filled before the upcoming presidential election.

20. 5 U.S. (1 Cranch) 137, 177 (1803).

Congress from playing a supplementary interpretive role in protecting what those branches deem to be rights guaranteed by constitutional amendments empowering Congress to enforce their substantive provisions.

In *City of Boerne v. Flores*,²¹ for instance, the Court famously made clear that it holds a distinctly hierarchical view of its relationship to Congress insofar as the meaning of the Reconstruction Amendment's self-executing provisions is concerned. There, it held—without dissent on this key point²²—that, although Section Five of the Fourteenth Amendment empowers Congress to adopt legislation to enforce the Constitution (and to enact narrowly tailored prophylactic measures to prevent its violation), Congress cannot do so by construing the underlying rights protected by that Amendment more broadly than the Court itself has construed them, even if the Court's judicial interpretation has been decisively narrowed by recognition of its own distinctive limitations as a federal judicial institution.²³ Regardless of political affiliation or ideology, the Justices tend to share this institutional commitment to preserving the Court's interpretive preeminence.²⁴

21. 521 U.S. 507 (1997).

22. Justice Stevens, while joining the majority opinion, argued in concurrence that RFRA also violated the Establishment Clause. *See id.* at 536-37 (Stevens, J., concurring). This alternative ground for decision could have avoided the Court's broad pronouncement of its interpretive dominance over Congress. The dissenters, on the other hand, argued *not* that RFRA was permissible from a separation-of-powers perspective, but rather that *Employment Division v. Smith*, 494 U.S. 872 (1990), the First Amendment decision from which RFRA purposefully deviated, was likely wrongly decided, and that it should be reexamined because its overruling would reconcile RFRA with the Court's own (pre-*Smith*) understanding of the Free Exercise Clause. *City of Boerne*, 521 U.S. at 544-45 (O'Connor, J., dissenting).

23. *Id.* at 517-20 (majority opinion). That the Court's *Marbury* function requires it to prevent Congress from using an ostensible power of interpretation to *dilute* protections held by the Court to be required by, for instance, Section One of the Fourteenth Amendment (and thus by the Fifth Amendment) seems entirely right. But it is another matter altogether for the Court to insist, as it has ever since *City of Boerne*, that Congress, despite its institutional differences from the Judicial Branch, is forbidden to define those protections more broadly than the Court has felt free to define them. *See* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 949 & n.121, 951 (3d ed. 2000).

24. This unity was showcased by the decision in *City of Boerne*. But it was displayed more subtly in a joint dissent in *Bank Markazi v. Peterson*, No. 14-770 (Apr. 20, 2016), by Chief Justice Roberts and Justice Sotomayor, in which the two unlikely allies vigorously defended the independence of the judiciary against what they saw as congressional attempts to dictate particular outcomes in pending litigation without changing the applicable underlying law. The Court's 7-2 division did not represent disagreement that Article III poses *some* limits on the extent to which Congress can prescribe judicial rules of decision—limits evidenced in the canonical case of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). *See Bank Markazi*, slip op. at 15. Rather, the majority and dissent disagreed over how to apply the (concededly hazy) rule of *Klein* and subsequent case law to the statute in question: Justice Ginsburg's majority found *Klein* inapposite because the statute created “new substantive standards.” *Id.*, slip op. at 18. But the Chief Justice found that argument conclusory, *id.*, slip op. at 12 (“Changing the law is simply how Congress acts. The question is whether its action

Time and again, the Court has thus underscored its commitment to an independent judiciary free to expound the Constitution decisively and without political interference. But despite the Roberts Court's recent turn away from the political question doctrine and the Court's juricentric focus, in separation-of-powers cases the Court often ducks hard constitutional questions and defers to the political branches even when there is no principled justification for doing so. One doctrinal culprit here turns out to be the very lodestar of the Court's separation-of-powers jurisprudence: the canonical tripartite framework enunciated by Justice Jackson's oft-quoted *Youngstown* concurrence.²⁵

The surface elegance of that concurring opinion contributed to its mesmerizing appeal. But despite its rhetorical power and seemingly clear categorical lines, the *Youngstown* framework actually provides precious little guidance in some of the hardest separation-of-powers cases: those involving executive action in the absence of either congressional authorization or prohibition—action in the face of legal silence. What's more, the *Youngstown* framework finds no place at all for significant dimensions of the separation-of-powers picture that are orthogonal to, and often absent from, the customary two-dimensional matrix of executive versus congressional powers, including such vexing and currently salient issues as the scope of prosecutorial discretion and federal power vis-à-vis the States, as well as transcendent concerns about individual rights. In neglecting such issues, the Court shirks its vital role in defining and policing the intricate structure of government established by the Constitution—a structure that must be preserved both to enable effective and politically accountable policymaking and to protect individual liberty.

I. THE PROBLEM OF CONGRESSIONAL SILENCE

Even on its face, the nearly sacrosanct triptych is deeply ambiguous on the key question of what to make of congressional silence. Jackson's *Youngstown* concurrence tells us that in *category two*—where there is an “absence of either a congressional grant *or* denial of authority”—the President “can only rely upon his own independent powers.”²⁶ Yet in the very next breath Jackson's concurrence undercuts this pivotal assertion, insisting instead that “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures of independent presidential responsibility.”²⁷

constitutes an exercise of judicial power.”), and instead found that the statute impermissibly exercised judicial power because it dictated the outcome of *specific* cases, *see id.*, slip op. at 9.

²⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

²⁶ *Id.* at 637 (emphasis added).

²⁷ *Id.*

The truth is that *Youngstown* offers no meaningful baseline against which to assess the operative legal significance of Congress's silence.²⁸ Nothing in *Youngstown*, including Jackson's classic concurrence, sets out a normative framework for deciding: (1) which kinds of presidential action in the relevant sphere are void unless plainly authorized by Congress *ex ante*; (2) which are valid unless plainly prohibited by Congress *ex ante*; and (3) which are of uncertain validity when Congress has been essentially "silent" on the matter although dropping hints about its supposed "will." Nor does the canonical Jackson concurrence speak to (4) what considerations should guide the resolution of cases within this uncertain third category.

In saying virtually nothing about the appropriate framework for evaluating presidential exercises of power along that *normative* constitutional axis—and instead charting presidential power only along the *descriptive* axis of congressional "will" on the matter—the *Youngstown* triptych left future courts maximum wiggle room—but only by setting up innumerable occasions for unaccountable, and frustratingly opaque, buck-passing among the branches.

Instead of formulating a tripartite scheme for mapping exercises of presidential authority against the backdrop of what it called the "will" of Congress, the Court should at least have begun the process of articulating a body of underlying principles to govern the constitutionality of various types of executive action when—apart from dubious efforts at reading the tea leaves of an imagined congressional "mind"—one simply cannot say either that Congress authorized the executive action at issue or that Congress instead prohibited it. Those underlying principles ought presumably to guide not only the Judicial Branch in reviewing contested presidential choices, but also the Executive Branch in making those choices and publicly defending them.

Youngstown's failure to articulate guiding principles has created a black hole that the Court has at times permitted Congress to fill even when doing so manifestly bypasses the Constitution's procedural and structural requirements for federal lawmaking. Article I, section 7 requires that all bills must pass both Houses of Congress and be approved by the President to have legal effect.²⁹ These structural hurdles exist both to prevent the gradual deformation of our governmental structure and to protect individual liberty. By ignoring these obstacles, Jackson's celebrated *Youngstown* concurrence invites courts to give the force of law to extra-constitutional congressional action by directing

28. See Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 *IND. L.J.* 515, 524 (1982) (arguing that the "search for external criteria to give operative legal effect to congressional silence can profitably begin by revisiting *Youngstown*.")

29. U.S. CONST. art. I, § 7; see *INS v. Chadha*, 462 US 919, 958 (1983).

judicial attention to the ineffable, and judicially constructed, “implied will of Congress”³⁰ rather than to the actual terms of duly enacted laws.

To be sure, understanding a measure that obeys the Article I process often demands attention to the legislation’s history and context as well as to the text and structure of what Congress enacted into law. But references to the undefined “*will of Congress*” leave the field wide open for unguided imputations to Congress of an inchoate set of floating intentions and purposes—and for giving those imputed intentions operative legal consequences. This is a process that Jackson himself, the year after *Youngstown*, derided as “*psychoanalysis*” rather than “*analysis*.”³¹ Unfortunately, this enlargement of lawmaking power outside of Article I continued to infect the doctrine even as new formalists reshaped American jurisprudence to strengthen the Constitution’s structural boundaries and to emphasize the primacy of *text* in statutory interpretation.³²

Consider *Dames & Moore v. Regan*,³³ which nicely exemplifies the dangers of *Youngstown*’s judicial sleight-of-hand when applied in practice. In the aftermath of the Iran Hostage Crisis, the Court pointed to three tangentially related statutes that concededly failed to authorize the executive suspension of private property claims against Iran.³⁴ The Court treated those “not-quite authorizations” as indications of congressional *acquiescence* even though highly similar “not-quite authorizations” in *Youngstown* had been treated as indications of congressional *opposition*. No doubt sensing its shaky footing, the Court added its interpretation of Congress’s subsequent silence in the face of the President’s seizure as implicit ratification of his decision.³⁵ Going still further, the *Dames & Moore* Court even suggested that a mere concurrent resolution passed by both chambers without presentment might have the legal effect of constraining the President’s powers by pushing his actions into *Youngstown*’s category three.³⁶

The consequences of the *Dames & Moore* dicta reverberate today: its promiscuous suggestion that a congressional non-enactment might have legal force was echoed this January in TransCanada’s challenge to the President’s

30. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

31. *United States v. Pub. Util. Comm’n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

32. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

33. 453 U.S. 654 (1981).

34. See *id.* at 685-88.

35. See *id.* at 687-88.

36. See *id.* (“Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement.” (footnote omitted)).

rejection of the Keystone XL Pipeline.³⁷ In response to this denial in November, the company sued to obtain permission to construct the pipeline.³⁸ In the complaint, the company leans heavily on *Dames & Moore*, stating that a bill authorizing the pipeline's construction yet vetoed by the President "expresses the will of Congress."³⁹ Despite the constitutional requirements of bicameralism and presentment, TransCanada is arguing that a bill authorizing the pipeline's construction expressed Congress's legally operative "will," despite President Obama's *veto* of that very bill.

TransCanada's invocation of *Dames & Moore* reveals the underlying tension between the Court's approach to "congressional will" in *Dames* and its subsequent firm pronouncements on the importance of Article I, section 7's presentment requirement in cases like *INS v. Chadha*⁴⁰ and *Clinton v. City of New York*.⁴¹ Two years after *Dames & Moore*, in *Chadha*, the Court reinforced the limitations of Article I by refusing to give legal effect to actions of Congress that do not take place "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."⁴² Rather than allowing its judgment to stand on more formalist grounds,⁴³ the *Chadha* Court recognized two important functions that the procedural hurdle of presentment serves. First, presentment buttresses the strength of the executive in order "to protect the Executive Branch from Congress" encroaching on its powers.⁴⁴ Second, presentment protects the country from improvident legislation that might invade personal liberty by "assuring that a 'national' perspective is grafted on the legislative process."⁴⁵ In crafting the presentment requirement, the Framers were determined to avoid the dangers that *Dames & Moore* created: the

37. *Statement by the President on the Keystone XL Pipeline*, WHITE HOUSE (Nov. 5, 2015), <http://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline> [<http://perma.cc/2U3F-U6MY>].

38. Complaint, *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex. Jan. 6, 2016).

39. *Id.*

40. 462 U.S. 919, 958 (1983).

41. 524 U.S. 417 (1998).

42. 462 U.S. at 958.

43. See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 72-74 (1985) (arguing that *Chadha* actually rests on the Appointments Clause, the Incompatibility Clause, and the Constitution's rejection of parliamentary government).

44. *Chadha*, 462 U.S. at 951; see also THE FEDERALIST NO. 73, at 371 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.").

45. *Chadha*, 462 U.S. at 948.

possibility of congressional overreach that endangers both the President's powers and individual rights. Indeed, James Madison urged the redundant language of Article I, section 7,⁴⁶ out of "concern that [presentment] might easily be evaded by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'"⁴⁷

Fifteen years after *Chadha*, Justice Kennedy's concurrence in *Clinton v. New York* addressed the important role that section 7 serves in our constitutional order.⁴⁸ In dissent, Justice Breyer had argued that the Court's opinion rejecting the line-item veto relied merely on rigid, formal boundaries that did little to protect the individual liberties that the separation of powers was designed to protect.⁴⁹ In response, Justice Kennedy articulated the idea⁵⁰ that "the conception of liberty embraced by the Framers was not . . . confined" to the modern conceptions of Due Process and Equal Protection; instead, Kennedy identified a more political liberty—sometimes called the "liberty of the ancients"—that an individual might lose if a political instrument such as the spending power could be exercised in a given instance by a single political branch, without any external check and "not subject to traditional constitutional constraints."⁵¹

As these two precedents—*Chadha* and *Clinton*—remind us, only congressional action consistent with the structure created by Article I are endowed with the force of law: with exceedingly rare exceptions, courts risk violating "due process of lawmaking" by giving legal effect to congressional silence.⁵² Yet this important lesson, among others, is often obscured by the geometric allure of Jackson's tripartite heuristic.

46. Compare U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States."), with *id.* cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States.").

47. *Chadha*, 462 U.S. at 947.

48. 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring).

49. *Id.* at 496-97 (Breyer, J., dissenting) ("Nor . . . do [the means of the Act] threaten the liberties of individual citizens.").

50. Justice Breyer would later describe a similar idea under the name of "ancient liberty" in his Tanner Lectures on Human Values, which later formed the basis of his 2007 book, *Active Liberty*.

51. *Id.* at 450-51 (Kennedy, J., concurring).

52. Tribe, *supra* note 28, at 528.

II. INFEASIBLE CONGRESSIONAL INSTRUCTIONS AND ENFORCEMENT DISCRETION

Beyond ending the constitutionally dubious attribution of legal force to actions that nothing in the Constitution's text or structure endows with the force of law, we need to enlarge the scope of *Youngstown's* triptych to encompass matters the Court had no occasion to address in that case. For example, we must address questions of executive enforcement discretion, and the frequent infeasibility, if not utter impossibility, of completely implementing federal law.⁵³ Congress's instructions—even when embodied in clearly stated enactments—frequently bear little relation to the facts on the ground and may indeed be internally inconsistent. When that occurs, the President is faced with a quandary: if Congress's "will" cannot be fully effectuated, how can the statutes it has enacted be enforced in a way that respects the rule of law?

The recurring conflict over the federal debt ceiling is a particularly dramatic example of such a quandary. In the summer of 2011, as the United States approached the statutory debt limit set by Congress, an extreme faction of the Republican Party threatened to block any attempt to raise the limit, which would have had devastating economic consequences.⁵⁴ The President was faced with a trilemma of unconstitutional options: ignore the debt ceiling and unilaterally issue bonds to fund congressionally mandated expenditures, unilaterally raise revenue, or unilaterally cut congressionally mandated spending.⁵⁵ Whichever horn of that trilemma the President chose, he would have been violating the law as enacted by Congress. Professors Michael Dorf and Neil Buchanan argued that the President's "least unconstitutional option" would be to ignore the debt ceiling and issue bonds, since this route would involve no judgment calls about how to raise revenue or which programs to cut, and would thus usurp fewer of Congress's prerogatives while respecting the reliance interests of individual taxpayers and beneficiaries.⁵⁶ But the constitutional question was never answered, as Congress agreed to raise the debt ceiling two days before its expiration.

53. Cf. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293 (2006) ("Prosecutorial discretion requires policy determinations about how best to implement a statutory program.").

54. See Letter from Timothy F. Geithner, U.S. Sec'y of Treasury, to Jim DeMint, U.S. Senator (June 28, 2011), <http://www.treasury.gov/initiatives/Documents/DLDeMinto62811.pdf> [<http://perma.cc/498W-24HS>] ("[A] failure to resolve [the debt ceiling] in the near term would have painful implications for people in every walk of American life.").

55. Neil H. Buchanan & Michael C. Dorf, *How To Choose the Least Unconstitutional Option: Lessons for the President (and Others) From the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1197 (2012).

56. *Id.* at 1243.

The bitter dispute over President Obama's deferred deportation orders is also a consequence of infeasible congressional instructions. The Immigration and Nationality Act (INA) makes huge numbers of U.S. residents deportable, but forcibly removing *all* of the 11 million or more undocumented immigrants from the country would require not only vastly more funds than Congress would ever appropriate but, worse still, a round-up and deportation apparatus that would approach a police state.⁵⁷ The necessarily selective enforcement regime that this situation requires makes it enormously difficult for the Executive to enforce the immigration laws in a principled, evenhanded manner. Such arbitrariness is the antithesis of the rule of law, and constitutes a threat to individual liberty.

Trying to bring order and lenity into this chaotic realm of unbounded discretion, President Obama introduced two executive programs: *Deferred Action for Childhood Arrivals* ("DACA") and *Deferred Action for Parents of Americans* ("DAPA"). Under these programs, certain unauthorized immigrants who have been in the country since 2010 and either arrived when they were younger than sixteen⁵⁸ or have children who are U.S. citizens⁵⁹ could apply for deferral of deportation and receipt of work authorization for three years.

Critics like Robert Delahunty and John Yoo have denounced Obama's action as a usurpation of legislative authority and breach of presidential duty,⁶⁰ claiming that the President is not exercising the normal case-by-case prosecutorial discretion approved by the Court in *Heckler v. Chaney*⁶¹ in 1985,

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57. See Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009) (arguing that the immigration "code has had the counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive").
58. Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Serv., and John Morton, Dir., U.S. Immigration and Customs Enf't (June 5, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/XAQ5-H8KC>] (establishing DACA).
59. Memorandum from Jeh Charles Johnson, Sec'y, Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Serv., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs and Border Prot. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/4CKQ-6HXC>] (expanding DACA and establishing DAPA).
60. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); see also Price, *supra* note 11, at 674 (noting that "President Obama's policies have sparked controversy" but nevertheless arguing that "his actions are not unique").
61. 470 U.S. 821, 831 (1985) (recognizing that the decision whether to prosecute a particular violation of the law implicates a number of factors that the executive is best placed to

but is instead legislating unilaterally.⁶² Central to their argument is the proposition that, because the Republican Congress *failed to enact* Obama’s DREAM Act—a more ambitious measure that would have provided a path to citizenship for over 2 million undocumented immigrants who entered the country as children—the President must be stuck in *Youngstown’s* category three.⁶³ This claim, as already noted, presupposes that Congress can transmute its supposed “will” into law without bicameral enactment and presentment. Interestingly, in the immigration challenge taken up in April 2016 by the Supreme Court, the Solicitor General advanced an argument *in favor* of DAPA that exhibited the same structural flaw as the argument made by DAPA’s critics: the SG’s brief invoked the *failure* of certain bills that would have *barred* DACA and DAPA as evidence that the DAPA Guidance was *lawful*.⁶⁴

Even leaving aside these problematic attempts to divine congressional intent, I would argue that, much as the Bill of Attainder Clause requires Congress to deal in generalities rather than punish identifiable individuals without judicial trial, the Executive Branch acts with fidelity to the Constitution when it seeks to exercise prosecutorial discretion in a similarly principled and generalized manner. As Gillian Metzger has argued, the deferred action programs further rule-of-law values by introducing consistency where the exercise of ad hoc discretion by low-level officials would otherwise prevail.⁶⁵ What’s more, the principles that guide the President’s deferred action programs are taken directly from the immigration statute itself. In many of its features, the INA exhibits a concern for preserving the unity of families composed of U.S. citizens and immigrants, as well as a purpose to prioritize the deportation of criminals. The deferred action programs give concrete and publicly articulated expression to those congressional priorities. Congress has also given the Executive broad discretion to grant work authorization,⁶⁶ and

consider, including whether prosecution would be a wise use of resources and whether prosecution is consistent with the government’s broader policies).

62. See Price, *supra* note 11, at 674.

63. See Delahunty & Yoo, *supra* note 60, at 783-84.

64. Brief for Petitioner at 60, *United States v. Texas*, No. 15-674 (2016) (“Congress has considered a series of bills that would bar implementation of DACA (and later DAPA) or block funding unless they are rescinded, and that would limit the Secretary’s authority to grant work authorization. . . . None has passed both the House and Senate, much less become law.”). The circuit court decision the Court had granted certiorari to review was ultimately affirmed by an equally divided Court, see *infra* note 68, thereby leaving the Fifth Circuit’s ruling in place and establishing no precedent.

65. Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1927-1929 (2015).

66. 8 U.S.C. § 1324a(h)(3) (2012).

for thirty years the Executive has been using this delegated authority to grant deferred action to certain classes of aliens.⁶⁷

The deferred action orders are on hold for now, after a 4-4 split at the Supreme Court left in place a Texas district court’s nationwide stay.⁶⁸ But a fully staffed Court will undoubtedly confront the constitutionality of the program in the near future, and, when it does, the Justices should hold that the President is fulfilling his constitutional duty to “take care” that the laws are faithfully executed by ensuring that deportations are carried out in an orderly manner that both enhances the rule of law and gives life to Congress’s own priorities.

III. THE NEGLECTED DIMENSION OF FEDERALISM

The President’s constitutionally vital enforcement discretion is important not just in the standard separation-of-powers disputes with Congress to which *Youngstown* speaks, but also in disputes about the substantive reach of federal power vis-à-vis the States—another vital structural question on which *Youngstown* had no occasion to offer guidance but which a suitably enhanced separation of powers matrix should encompass.

Justice Kennedy traced the connections among executive under-enforcement, state sovereignty, and individual liberty in *Arizona v. United States*,⁶⁹ which held that a state law facilitating deportation interfered with the federal government’s exclusive authority to regulate immigration.⁷⁰ Justice Kennedy noted that the Executive’s decisions not to prosecute “embrace[] immediate human concerns” such as family and community ties.⁷¹ Tasking one branch of government with evaluating these mitigating factors, he reasoned, enables an evenhanded, predictable, and humane application of the law that would be impossible if fifty-one separate actors took such matters into their own hands.⁷² Far from being a tyrannical power grab, this executive leniency exemplifies the two virtues that Judge Kavanaugh has recognized as central to legitimate executive enforcement discretion: protection of individual liberty and support for the rule of law.⁷³

67. The Dep’t of Homeland Sec.’s Auth. To Prioritize Removal of Certain Aliens Unlawfully Present in the United States and To Defer Removal of Others, 38 Op. O.L.C. 1, 2 (2014).

68. *United States v. Texas*, No. 15-674, slip op. at 1 (June 23, 2016) (per curiam).

69. 132 S. Ct. 2492 (2012).

70. *Id.* at 2524 (Thomas, J., concurring in part and dissenting in part) (objecting to the majority’s holding that provisions of Arizona law were pre-empted).

71. *Id.* at 2499; see also *TRIBE & MATZ*, *supra* note 1, at 211-12.

72. See *Arizona*, 132 S. Ct. at 2498-99.

73. *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013).

As with immigration, the federal government's recent accommodation of the states that have legalized medical and sometimes recreational use of marijuana similarly exemplifies the intersection of federalism, individual rights, and executive enforcement discretion. In 2013, after a number of state ballot initiatives legalized the possession and sale of marijuana, the Deputy Attorney General issued a memorandum suggesting that "federal officials [could properly] decline prosecution of even large scale growers if [they] complied with state law and if the states maintained a 'a strong and effective state regulatory system.'"⁷⁴ Although the federal government has ample authority to override these permissive state laws under *Gonzales v. Raich*,⁷⁵ it has refrained from doing so out of respect for the states' policy judgments. As with DAPA, the President's decision to systematize and provide guidance regarding the situations in which the federal government may refrain from fully enforcing the dictates of the Controlled Substances Act furthers important constitutional values of uniformity and non-arbitrariness in enforcement—as well as values of federalism and respect for individual rights.

IV. THE NEGLECTED DIMENSION OF INDIVIDUAL RIGHTS

The concern for individual rights that partially animates Obama's exercises of enforcement discretion in the immigration and marijuana-prosecution contexts highlights a final and especially significant dimension only barely hinted at in Jackson's *Youngstown* concurrence, and all but omitted from the way that concurrence has been conventionally understood. Indeed, perhaps the triptych's most significant limitation is its insufficient focus on the rights of the individuals whose injuries characteristically bring separation of powers disputes within the orbit of Article III in the first place. *Youngstown* is traditionally conceptualized as a case merely about mapping presidential power vertically along the horizontal axis of expressed congressional will: as Congress's "will" moves from approval to disapproval along the *x*-axis, the President's power rises from high to low along the *y*-axis. But this conventional two-dimensional understanding obscures the central importance of *individual rights* as an independent axis or dimension limiting presidential authority.

In his celebrated concurrence, Justice Jackson makes the often overlooked observation that, although the President may invoke the Executive Power Clause⁷⁶ and the Take Care Clause⁷⁷ as fonts of textually unspecified power,

74. Price, *supra* note 11, at 758 (quoting Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All United States Attorneys, U.S. Dep't of Justice (Aug. 29, 2013), http://www.oregon.gov/olcc/docs/commission_minutes/2015/Cole_Memorandum.pdf [<http://perma.cc/CGP7-GLGU>]).

75. 545 U.S. 1 (2005).

76. U.S. CONST. art. II, § 1, cl. 1.

any such “authority must be matched against words of the Fifth Amendment that ‘No person shall be . . . deprived of life, liberty, or property, without due process of law.’”⁷⁸ In Justice Jackson’s words, Article II grants the President “authority that reaches so far as there is *law*,” but the Due Process Clause “gives a private right that authority shall go no farther.”⁷⁹

I take this to mean that Justice Jackson did not need to “hear” in Congress’s silence the imagined sounds of opposition to the seizure power Truman sought to exercise. All he needed was to invoke the Due Process and Takings Clauses of the Fifth Amendment⁸⁰ in order to conclude that a governmental taking of what was undoubtedly private property—even for pressing public ends and even with the prospect of ultimate compensation—constituted a deprivation of the owners’ rights without legal authority (and thus a violation of the Fifth Amendment’s Due Process Clause), unless undertaken pursuant to *ex ante* congressional authorization. Despite this (admittedly glancing) reliance on the individual rights dimension of *Youngstown*, both the Court and academic commentary on its separation of powers jurisprudence have, with relatively rare exceptions like *Arizona v. United States*,⁸¹ consistently undervalued—and at times have paid no attention at all—to the distinctly human dramas involving individual rights that underlie the Court’s most significant separation of powers decisions.

This inattention to the human element inherent in separation-of-powers disputes is both ironic (because it is typically that human element that brings such disputes within reach of the Judicial Power) and consequential; the human element bears not only on difficult interpretive issues where the structural and the personal intertwine, but also on threshold questions of how free a court should feel to exercise the “passive virtues” of avoiding involvement despite the existence of a genuine Article III “case or controversy.”⁸²

In a suit filed in May 2016 by U.S. Army Captain Nathan Smith,⁸³ those threshold questions are particularly intriguing. Captain Smith alleges that the Obama administration’s military campaign against ISIL has not been

77. U.S. CONST., art. II, § 3, cl. 5.

78. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

79. *Id.* at 646.

80. U.S. CONST. amend. V.

81. 132 S. Ct. 2492 (2012).

82. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

83. See Complaint, *Smith v. Obama*, No. 1:16-cv-00843-CKK (D.D.C. May 4, 2016) [hereinafter *Smith* Complaint].

authorized by Congress, and is thus unlawful under the War Powers Resolution⁸⁴ and under Article II's Take Care Clause.⁸⁵ Rather than pleading the case as an abstract separation-of-powers dispute, Smith, an intelligence officer stationed in Kuwait who oversees troops battling ISIL, argues that his uncertainty about the war's legal status requires him personally to violate his oath to 'bear true faith and allegiance' to the Constitution⁸⁶—a far cry from the sorts of purely "structural" injuries claimed in the many war-powers cases where legislators have sued the executive.⁸⁷ Further, Smith's nonjudicial alternative for acting on his uncertainty—disobeying orders and abandoning his part in the hostilities—could subject him to harsh and immediate military punishment.⁸⁸

I would expect the Administration to assert that war-powers disputes are nonjusticiable political questions, and that Smith's purported injury doesn't create standing.⁸⁹ But regardless of whether the war against ISIL is in fact unauthorized—a difficult interpretive question of concededly political moment lying at the heart of the separation of powers⁹⁰—justiciability doctrines should not shut Smith out of the courthouse. For one, Chief Justice Roberts's majority

84. 50 U.S.C. § 1544(b) (2012) (requiring the President to obtain congressional approval within 60 days of sending American troops into hostilities).

85. Specifically, Smith claims that American involvement is not justified by any of the bases that the Administration relies on: the 2001 or 2002 Authorizations for Use of Military Force (AUMFs), or the President's commander-in-chief power—and that the War Powers Resolution thus requires the military action to cease. His complaint also admonishes the Administration for relying on these bases *implicitly*, rather than through formal opinions by the Office of Legal Counsel or White House Counsel. See *Smith Complaint*, *supra* note 83, at 8-9.

86. Marty Lederman, *Why Captain Smith's Suit To Enforce the War Powers Resolution Won't Be a Big Deal*, *Just Security* (May 9, 2016, 8:42 AM), <http://www.justsecurity.org/30949/captain-smiths-suit-enforce-war-powers-resolution-big-deal> [<http://perma.cc/2KX7-6FL2>].

87. See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

88. See Bruce Ackerman, *Is America's War on ISIS Illegal?*, *N.Y. TIMES* (May 4, 2016), <http://www.nytimes.com/2016/05/05/opinion/is-americas-war-on-isis-illegal.html> [<http://perma.cc/DH93-ZHB5>].

89. See Lederman, *supra* note 86.

90. Professors Marty Lederman and Jack Goldsmith each predict that Smith would lose on the merits if the case were justiciable, with the court likely ruling that the 2001 or 2002 AUMF, when combined with an absence of congressional *disapproval* of hostilities against ISIS and with the presence of congressional appropriations funding those hostilities, is sufficient authorization for purposes of the War Powers Resolution. *Id.*; Jack Goldsmith, *Analysis of Lawsuit Challenging War Against ISIL*, *LAWFARE* (May 4, 2016, 1:03 PM), <http://lawfareblog.com/analysis-lawsuit-challenging-war-against-isil> [<http://perma.cc/6FSR-D64L>] (suggesting appropriations for hostilities imply congressional authorization).

opinion in *Zivotofsky I*⁹¹ could be read as all but obliterating the political question doctrine when it comes to cases alleging that the executive is violating a statutory restriction like the War Powers Resolution.⁹² But even if *Zivotofsky I* does not support Captain Smith's claim quite so categorically,⁹³ the court should not ignore the gravity of his individual stake—avoiding the Catch 22 of either continuing to fight a possibly illegal war or disobeying orders and subjecting himself to military discipline—in deciding whether his claim is justiciable. To be sure, the political question doctrine is well suited to bar judicial resolution of *some* separation-of-powers disputes, especially those that request sprawling, unmanageable remedies,⁹⁴ but here the Captain seeks to vindicate a vital personal interest through a simple yes-or-no judicial declaration resting firmly on classic principles of statutory interpretation. A court's refusal to hear the case on political question grounds would leave Smith with an unacceptably difficult personal dilemma⁹⁵ that, ironically, the political branches would likely never solve absent judicial intervention.⁹⁶

The Court's *Zivotofsky II* decision in 2015, which cleared the political question hurdle to reach the merits, rested on a puzzlingly broad and fuzzy

91. 132 S. Ct. 1421 (2012).

92. See *id.* at 1427 (“The existence of a statutory right . . . is certainly relevant to the Judiciary’s power to decide Zivotofsky’s claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored [policy] determination . . .”). While the Court did not explicitly lay down a categorical rule against “statutory political questions,” it is telling that Justices Sotomayor and Alito went out of their way in concurrences to suggest that some statutory challenges could still be barred. See Chris Michel, Comment, *There’s No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L.J. 253, 259 (2013).

93. See *The Supreme Court 2011 Term—Leading Cases: Section I*, 126 HARV. L. REV. 176, 307, 313–17 (2012) (proffering prudential reasons for reading *Zivotofsky I* more narrowly, including in cases brought under the War Powers Resolution).

94. See *TRIBE*, *supra* note 23, at 376 & n.56 (contrasting two cases decided in the wake of the Kent State shootings in 1971: *Gilligan v. Morgan*, in which the Court invoked the political question doctrine to bar a suit seeking systematic reform of the training of the Ohio National Guard, and *Scheuer v. Rhodes*, in which the Court heard on the merits an action for damages by families of the shooting victims).

95. In 1967, the Court denied certiorari over several soldiers’ challenge to the legality of the Vietnam War that was dismissed in the courts below. *Mora v. McNamara*, 389 U.S. 934 (1967) (mem.). In dissent, Justices Stewart and Douglas urged that, given the gravity of the issues presented, the Court should at least *decide* whether the challenge was justiciable even if it had doubts, and Justice Douglas specifically emphasized the denial’s burden on the individual soldiers. See *id.* at 939 (Douglas, J., dissenting) (“These petitioners should be told whether their case is beyond judicial cognizance.”).

96. See Garrett Epps, *The War that Congress Won’t Declare*, THE ATLANTIC (Aug. 22, 2015) <http://www.theatlantic.com/politics/archive/2015/08/aumf-isis/402017/> [<http://perma.cc/MZM9-2SXX>] (“This war is an ongoing violation of the Constitution, one of the most severe of the 21st century. But it is a violation in which both parties are happy to collaborate.”).

notion of the President's supposedly exclusive power to determine which sovereign governs which foreign territory⁹⁷ and appears even *more* puzzling when filtered through the lens of individual rights: the Court's decision virtually ignored the weight of Menachem Zivotofsky's individual rights and of the individual rights of others similarly situated.

In assessing Menachem's and his parents' personal claim to have the child's Jerusalem birthplace designated by the State Department as part of the Nation of Israel on Menachem's U.S. passport, the Court spoke exclusively in terms of Presidential authority measured against Congress's "will" that Israel be designated as the child's nation of birth in accord with his parents' formal request.⁹⁸ Just as the Due Process Clause limited President Truman's power to seize private property in *Youngstown*, so too the Clause should have given at least provisional protection to Zivotofsky's "liberty" entitlement that had been granted by Congress through a specific statutory right to express, through an American passport, his family's "conscientious belief that Jerusalem belongs to Israel."⁹⁹ Although Congress was under no constitutional obligation to grant the Zivotofskys that statutory entitlement to a facet of personal liberty,¹⁰⁰ the Court should at least have considered whether the President had impermissibly *conditioned* the liberty entitlement on the family's submission to the administration's views about who *was* sovereign over East Jerusalem—views that the Zivotofskys sought, partly on religious grounds, to contradict.¹⁰¹

97. Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).

98. See *Zivotofsky II*, 135 S. Ct. 2076, 2084 (2015).

99. *Id.* at 2117 (Scalia, J., dissenting); Brief for the Petitioner at 16, *Zivotofsky II*, 135 S. Ct. 2076 (2015) (No. 13-628) ("To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in 'Israel.'").

100. *Cf.* *Walker v. Sons of Confederate Veterans*, Tex. Div., 135 S. Ct. 2239 (2015) (holding that Texas was under no First Amendment obligation to include a Confederate-flag vanity plate in its menu of options available to drivers upon request and payment of a fee, reasoning that license plates issued by the State carry purely "government speech" and that the First Amendment imposes no limits on government's discretion regarding what to say and what not to say). I have elsewhere defended the result in that case, *not* on the Court's ground that state officials enjoyed absolute discretion over the decision whether to issue a Confederate-flag license plate under the government speech doctrine, but on the basis that the Equal Protection Clause forbids the state from "speaking" in a way that promotes racial hierarchy and hatred, just as the Establishment Clause forbids government to "speak" in a manner that endorses a religion. See Laurence H. Tribe, *The Constitution Writ Large, Part One*, BALKINIZATION (July 13, 2015), <http://balkin.blogspot.com/2015/07/the-constitution-writ-large-part-one.html> [<http://perma.cc/52VX-F5YJ>].

101. A decision focusing on that "unconstitutional conditions" dimension of the case would have been reminiscent of *Speiser v. Randall*, 357 U.S. 513 (1958), the landmark decision holding that, while the State of California could constitutionally have withheld a special property tax exemption from *all* veterans, it could *not* condition the privilege of such an exemption on a veteran's promise to refrain from advocating the State's overthrow.

Deciding how to conceptualize the individual right at issue in *Zivotofsky II* is admittedly challenging. But it is possible. Decades ago, I suggested that there is an underappreciated structural dimension to the due process requirement, mandating that in identifiable areas “governmental policy-formation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure.”¹⁰² This notion builds on the Madisonian idea that the separation of powers ultimately exists to serve individual liberty and posits that “neutral” structural principles of how law should be developed – both before, and in the process of, being applied – are “worth embracing as constitutional precepts only to the extent that the substantive human realities” they engender cohere with underlying constitutional principles and values.¹⁰³

In *Zivotofsky II*, the Executive justified its decision to disregard the family’s section 214(d) request to list Israel as their son’s birthplace on the ground that the structural separation of powers precluded Congress from passing section 214(d) in the first place. Yet under a theory that attends to what I have called structural justice, that justification rings hollow, or at least begs the question. One could just as easily argue that the administration denied the family a positive law right by undertaking a legislative action (in the form of nullification) that deprived them of liberty without due process of *lawmaking*.

In sum, I offer this modest proposal as a “friendly amendment” to the Jackson triptych: the individual rights at stake in cases like *Zivotofsky II* – as in *Youngstown* itself – should be conceptualized as a *distinct third dimension*, perpendicular to and superimposed upon Justice Jackson’s original “flatland” diagram: when the President takes action adverse to a claim of individual right, whether by positive action (as in *Youngstown* or in Captain Smith’s situation) or by negative action (as in *Zivotofsky II*), structural justice requires that we evaluate the alleged deprivation as part of the calculus set out in Justice Jackson’s map plotting the curve of presidential authority vis-à-vis congressional will. Likewise, structural considerations mandate that attributions of congressional will to that body’s actions (or inactions) be made not casually but only with meticulous attention to the architecture of lawmaking set out in Article I.

So too should federalism be added as a *fourth dimension* in the constitutional space of separation of powers. Within this more encompassing framework, a wider range of constitutional principles can inform our understanding of the legal and human impacts of disputes between Congress and the President; for example, it can help us see how a President’s liberal use of enforcement discretion might be justified by individual rights or federalism

¹⁰² Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 291 (1975).

¹⁰³ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1673 (2d ed. 1988).

values in one context, as in the immigration and marijuana cases, but may undermine those values in another context, as in *Zivotofsky II*.

I do not doubt that Justice Jackson was right as a *descriptive* matter when he noted the fluid and highly contextual ebb and flow of executive power—but I do believe he erred as a *normative* matter when he focused his gaze downward to search for legal answers solely in this shifting tide. If instead he had followed the impulse that guided him in *West Virginia Board of Education v. Barnette*—if he had looked up at the firmament that he had invoked in that decision less than a decade before *Youngstown*—he could have seen how “the fixed star[s] in our constitutional constellation”¹⁰⁴ might help mark the lawful shape of presidential power.

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¹⁰⁴. 319 U.S. 624, 642 (1943).